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Beyond Victim Impact Evidence: A Modest Proposal

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Essay

Beyond Victim Impact Evidence: A Modest Proposal

by
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I. Underpinnings for the Proposal

The appalling increase in serious criminal activity is a regrettable fact of modern life.[1] Particularly shocking is the number of murders committed.[2] Two urgent, concentric problems concerning the treat-

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Payne v. Tennessee, 501 U.S. 808 (1991), the decision that provoked this Essay, is a noteworthy case on a number of grounds, not the least of which is that it contains the last opinion, a searing dissent, penned by Justice Thurgood S. Marshall. Justice Marshall's passing in January 1993 marks the end of an epoch. His courage and tenacity defined for half a century the struggle for civil rights, and for simple justice. He spoke with unfailing courage for all those who have no defenders in society. In the last quarter-century, only retired Justices William J. Brennan and Harry Blackmun remained as steadfast in opposition to the death penalty. I humbly dedicate this essay to Justice Marshall.

1. The most recent figures available from the United States Bureau of Justice Statistics estimate that in 1990, 4,349,817 adults of a total adult population of 185,105,000—or 2.35% of the entire adult resident population of the United States—were on probation, in jail, in prison, or on parole. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES 5 (1992) [hereinafter CORRECTIONAL POPULATIONS]. As of 1992, one violent crime, including murder, forcible rape, robbery, and aggravated assault, occurred every 22 seconds in the United States. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS 4 (1992) [hereinafter UNIFORM CRIME REPORTS].

2. The number of murders reached a pinnacle during 1990; approximately 23,438 murders were reported, representing 1% of all reported violent crimes. This volume of killings represented a nationwide increase of 9% over the previous year. The number of murders committed rose 14% nationally between 1986 and 1990. UNIFORM CRIME REPORTS, *supra* note 1, at 4.

ment of murderers and those victimized by their murderous deeds merit the most immediate, grave consideration. First, those killers who are successfully apprehended and convicted are incarcerated for protracted periods of time, often extending into decades, while they await execution or serve the sentences meted out to them. The public expense of maintaining these killers during incarceration is staggering.[3] Prison generally permits them to engage in only the most desultory, unprofitable activity. Because these miscreants contribute nothing to the common good, society reaps no perceptible benefit from its massive investment in their care.

Second, the modern criminal sentencing process is inherently defective in its imbalance. Once convicted, the murderer is permitted to parade weeping relatives and friends before the jury as a ploy for mercy.[4] This very same criminal sentencing process does nothing, however, to restore those innocent family members and other survivors injured by the criminal's murderous act or to provide them any

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The escalation of all types of crime presents a pressing societal problem. However, in attempting to present the modest solution explained in this Essay, I focus only on the problems associated with capital crimes.

3. From the beginning of 1977 through the end of 1992, a total of 188 executions were carried out by 20 states. During this same time period, 3979 murderers were imprisoned after conviction for capital murder. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT 1992 2 (1992) [hereinafter CAPITAL PUNISHMENT]. The economic inefficiency that permeates a system in which expenditure sources overwhelm output by a factor of more than 21-to-1 is manifest, as is the appalling cost. The most recent statistics available indicate that in 1990 the average annual cost of maintaining one adult criminal in prison was $15,513. Federal prisons appear to be more cost effective, with an average cost of $14,456; the 1990 average cost in a state prison was $15,604. CORRECTIONAL POPULATIONS, *supra* note 1, at 63.

That murderers consume no more in food and other necessities than other miscreants can safely be assumed. However, murderers tend to feed off the public trough for longer periods of time, especially given the torpid rate at which the states manage to execute them. For example, in 1991, length of incarceration in months of the 2356 prisoners under sentence of death in the United States was as follows: less than 12 months, 231 (9.8%); 12-23 months, 242 (10.27%); 24-35 months, 271 (11.5%); 36-47 months, 240 (10.19%); 48-71 months, 438 (18.59%); more than 71 months, 934 (39.64%). The median number of months of incarceration for this population of murderers was 57 months. *Id.* at 142.

Moreover, this population is relatively youthful, the eventuality being that public support will be protracted. Of the 2356 incarcerated capital murderers, 650 (27.6%) were under the age of 30; 1065 (45.23%) were between the ages of 30-40; 577 (25.5%) were between the ages of 40-54; and only 64 (2.7%) were over the age of 55. *Id.* at 144.

4. The sentencing body must consider any arguably relevant information offered by the convicted murderer, including all circumstances that could influence it to reject the death penalty. Mclesky v. Kemp, 481 U.S. 279, 305-06 (1987). Also, the sentencing body must consider the character of the criminal and the circumstances of his crime. Zant v. Stephens, 462 U.S. 862, 878-79 (1983); Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

form of solace or catharsis. Could any spectacle be more infused with poignancy than that of the grieving survivors of murderous villainy being subjected to further alienation and insensitivity by a criminal sentencing process that affords them no rights, no authority, no protections, no spokesperson, no voice?[5]

In *Payne v. Tennessee*,[6] the United States Supreme Court took cognizance of the plight of victims. Unfortunately, the Court's resolution is sufficient neither in vigor nor in thoroughness.

Payne states that, in capital cases, the Eighth Amendment erects no obstruction against "victim impact" evidence. In determining whether execution is the deserved punishment for capital murder, a state can allow the fact finder to consider "the full extent of the harm caused by the crime, including its impact on the victim's family and community."[7] The gravity of the consequences of the criminal's act, stated the Court, is essential to the fact finder's meaningful assessment of "the defendant's moral culpability and blameworthiness."[8] This evidence could include information concerning the deceased's personal attributes and accomplishments, as well as the financial, emotional, and psychological impact of the slaying upon the deceased's family and loved ones.[9] The Court's attempt to infuse into the criminal sentencing process some modicum of equilibrium between the rights of the malefactor and those blameless individuals victimized by his[10] treachery is most laudable. This is especially so because the effort required the Court to overrule two very recent cases, both of which had declared the admission of victim impact evidence in capital trials a per

5. Because this Essay focuses on murder, the term "victim" is sometimes also used to denote the family members and loved ones of the deceased.

6. 501 U.S. 808 (1991).

7. *Id.* at 830 (O'Connor, J., concurring). Although *Payne* involved analysis of the constitutional implications of a state allowing victim impact evidence, presumably no constitutional infirmities would inhere in similar federal practices.

8. *Id.* at 825. Thus, a state can provide the fact finder "'a quick glimpse of the life [the criminal] chose to extinguish,' to remind the jury that the person whose life was taken was a unique human being." *Id.* at 830-31 (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, J., dissenting)).

9. *Payne* suggests that prohibiting state or federal prosecutors from admitting victim impact evidence in capital trials is fraught with numerous perils: of transforming the flesh-and-blood deceased into a "faceless stranger at the penalty phase of a capital trial," of depriving "the State of the full moral force of its evidence," and of concealing from the fact finder "all the information necessary to determine the proper punishment for a first-degree murder." *Id.* at 825.

10. As of year-end 1991, 98.6% of the 2482 criminals incarcerated under a sentence of death for capital murder were male. Thus, although the designation of these wretches by the pronoun "he" may affront females who are violent killers, it is the fact that, statistically, most murderers are men. CAPITAL PUNISHMENT *supra* note 3, at 10.

se violation of the Eighth Amendment.[11] In the end, nonetheless, the Court takes merely a tentative first step in addressing the deep-rooted problems that infect the criminal sentencing process. The Court simply did not go far enough. All deliberate persons of good faith would agree that the lack of economic efficiency in protracted incarceration of murderers and the lack of meaningful vindication for tormented survivors present exigent grievances that should be addressed with dispatch.[12]

After much deliberation, and with all due modesty, I propose a solution that will both satisfy the victims' need for catharsis and support and transform murderers from unproductive charges upon the public coffers to contributing members of society.[13]

II. Components of the Proposal

My Proposal simply measures in tangible terms the harm the murderer inflicts upon the community and upon the bereaved survi-

11. Booth v. Maryland, 482 U.S. 496 (1987), held that the testimony and the statements of the victims themselves were per se inadmissible on Eighth Amendment grounds. South Carolina v. Gathers, 490 U.S. 805 (1989), extended the per se proscription to argument by the prosecutor. In overruling precedents aged by only a few years, the Court quoted Justice Cardozo: "'[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.'" *Payne*, 501 U.S. at 827 (quoting Snyder v. Massachusetts, 291 U.S. 97, 122 (1934)).

Both *Booth* and *Gathers* were 5-4 decisions. The Court experienced personnel shifts subsequent to these decisions: Justice Kennedy replaced Justice Powell following *Booth*, and Justice Souter replaced Justice Brennan following *Gathers*. What reasonable person would quarrel with the proverb, "Might makes right"? The *Payne* dissent could muster only three votes—Justices Marshall, Blackmun, and Stevens. Thus, in penning the majority opinion, Justice Rehnquist, in an abundance of rationality and sensibility, declared:

> *Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the underpinnings of those decisions. They have been questioned by members of the Court in later decisions, and have defied consistent application by the lower courts. . . . [T]hey were wrongly decided and should be, and now are, overruled.

Payne, 501 U.S. at 828-30 (citations and footnote omitted).

12. A related concern is that from a broad societal perspective, the process by which criminals are sentenced is deficient insofar as it permits society to express neither its fury or outrage at the murderer, nor its empathy or support for the murdered victim's loved ones. Constructing a retributive forum in which society can unleash its collective indignation is an important consideration in any solution proposed.

13. My Proposal boasts many other advantages, all of which are detailed in this Essay: it provides a retributive context in which society generally can express its collective outrage and revulsion against the horrifying swell of criminal heinous acts; it aids in the restoration of public confidence in the legal system and its judicial processes; it facilitates deterrence of other potential murderers; and it encourages the convicted criminal to repent.

vors, and then offers the survivors a material role in the punishment of the murderer.

If, as the Court stated in *Payne*, the harm inflicted upon the family, loved ones, and community of the slain victim is an integral element of the criminal's blameworthiness, then a serious attempt should be made to appraise that damage in concrete terms. I propose, therefore, that a calibrated scale be crafted to assign points to the survivors in order to graphically calculate the depth and degree of their loss.

Next, those family members and loved ones victimized by the murder should be provided an effective means of participating in the process of punishing the murderer. The level of survivor participation permitted is conditioned upon the numbers of points they amass.

Finally, the criminal himself should be afforded an opportunity to redeem himself by contributing to society's general welfare; in effect, to give back, in some small measure, that which he has taken by his crime.

A. The Calculation of Impairment Points

In considering the damage inflicted by a murderous act, my Proposal begins by calculating what I refer to as "impairment points." This process requires that three factors be weighed: (1) the actual degree of trauma or injury suffered by the grieving family and loved ones;[14] (2) the status of the victim; and (3) the degree of harm inflicted upon society at large. For each factor, a score between zero and five will be assigned, for a minimum total of zero impairment points, and a maximum total of fifteen.[15]

Trauma or injury suffered by the survivors.[16] The first factor to be considered—the actual degree of trauma and bereavement endured

14. My use of the term "loved ones" in conjunction with "family members" is not tautological. Depending upon the nature and quality of their family relationships, many persons might experience more genuine affection for friends and lovers than for those to whom they are bound by familial or conjugal ties. These loved ones also should be afforded the participation rights described in my Proposal.

15. This formula can be graphically expressed as follows: $IP_{SV+SV+TSO}$. IP=impairment points; TSV=trauma of the survivors; SV=status of the victim; and TSO=trauma to society.

Of course, the final decision concerning the assignment of appropriate numbers of impairment points, as with so many critical decisions in the criminal legal process, should be relegated to the fact finder. However, as will be discussed, expert assistance should be available to aid the fact finder with some aspects of this enumeration. Expert assistance will be exceedingly valuable in assessing the first and third factors, trauma wreaked upon the family and loved ones of the deceased and upon society generally.

16. For purposes of this Proposal, if the survivors have suffered any harm at all as a consequence of the slaying, it is assumed that the impairment is grave because this Propo-

by the survivors—focuses upon the tangible emotional, psychological, moral, and economic injury sustained by the slain victim's family and loved ones. Persons of forthrightness and candor must concede that not all slayings inflict the same degree of impairment or anguish upon survivors. Indeed, the slaying of certain victims—an estranged, abusive, or shiftless spouse; a ne'er-do-well, indolent offspring; or a tiresome, manipulative, meddling relative—might actually provide a net benefit to the survivors.[17] My Proposal pragmatically takes account of these realities.

Necessarily, this assessment is so inherently subjective that, unquestionably, family members and loved ones should be allowed to articulate for the fact finder the degree and quality of their grief, shock, anguish, economic loss, or additional impairment. However, sole reliance upon the testimony of family members and loved ones is inappropriate for at least two reasons. First, either an excess of zeal or the prospect of enhancing their impairment score might tempt family members and loved ones to exaggerate the nature and extent of their trauma. Second, survivors somewhat lacking in eloquence should not be penalized. Thus, I recommend that, just prior to the criminal trial, the prosecution order an independent investigation. In the course of this inquiry, friends, associates, and acquaintances of both the deceased and the survivors would be queried in an effort to determine the true nature and extent of grief, trauma, and impairment suffered by the surviving family members and loved ones.[18]

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sal focuses only on capital cases. Death is, after all, the ultimate trauma. But in all modesty, the scale crafted by my Proposal could be adapted for use in other, non-capital crimes that cause death or severe bodily harm—manslaughter, rape, assault, and mayhem, to name a few—by adding a fourth factor taking account of the quantum, nature, and degree of harm inflicted upon the victim. For example, categories of harm could be delineated and points assigned as follows:

I. Insubstantial (0-2): Minor inconvenience, little or no physical or psychological trauma.

II. Substantial (3-5): Significant physical or psychological trauma, or significant loss of or injury to property.

III. Serious (6-8): Serious trauma, grave injury to dignity, *e.g.*, permanent disability or disfigurement.

IV. Grave, harsh, severe, grievous (9-10): Death.

17. However, this first factor must be assiduously distinguished from the remaining two: the status of the victim and the impairment experienced by society at his loss. Even vile pimps and drug dealers have parents, some of whom, presumably, love their children despite the corruption or immorality they exhibit. These loving parents should not be wholly deprived of the opportunity to amass impairment points.

18. Although not the objective of my Proposal, an incidental benefit is that its adoption would ameliorate difficult economic times, to some extent, by providing employment for an entirely new class of professional persons—impact assessors. These assessors could

Status of the victim. The second factor to be considered—the status of the victim—focuses upon the deceased and attempts to take account of the victim's unique attributes and accomplishments. This factor rewards[19] the slain victim in accordance with the quality of life he had attained for himself.[20] Considerations include: the victim's educational attainments or other skills acquired or credentials accumulated; wealth amassed;[21] professional or occupational achievements; and any other factor that distinguished the victim as a unique, valuable, or valued individual.[22]

Although this assessment is also highly subjective, the independent investigation need do nothing more than unearth information concerning the attributes of the deceased. Assignment of impairment points for this factor is a matter of judgment, values, mores, and common sense that are well within the purview of the fact finder.

Impairment to Society. This factor focuses upon the loss experienced by society generally at the demise of the deceased and the harm to society from the degree of viciousness apparent in the manner of his killing. Thus, assessment of this factor necessitates weighing both the deceased's innate utility to the commonweal and the brutality or severity of the means used to kill him.

As Justice Rehnquist opined in *Payne*, "'the victim is an individual whose death represents a unique loss to society . . . .'"[23] This singularity of each victim necessitates the conclusion that each victim has

be drawn from a variety of underemployed professional backgrounds: lawyers, sociologists, social workers, psychologists and other mental health professionals, and perhaps journalists. Of course, the services of accountants would be particularly useful in calculating the appropriate number of impairment points.

19. Unfortunately, the reward can be bestowed only posthumously.

20. For considerations of consistency, see *supra* note 10, I refer to the slain victim in the masculine gender, although this designation is not supported by available statistics. In 1990, of 10,722 homicide victims, 8053 or 75.1% were males, 2588 or 24.13% were females, and 81 or 0.76% were of unknown gender. UNIFORM CRIME REPORTS, *supra* note 1, at 4.

21. Criticism that the economic prosperity of the victim insinuates an inappropriate factor into the calculation of impairment points will not be brooked. After all, the wealth of the defendant is a pivotal factor, critical to the nature of legal services provided, as well as to the services of investigators, psychiatrists, and the plethora of experts and other personnel available to secure the defendant's release. Equilibrium between the rights of the homicidal criminal and the rights of the hapless victim mandate that wealth be a considerable factor on both sides.

22. Additional factors might be those along the lines of development of or participation in special nonprofessional skills or hobbies, such as proficiency in amateur sports, playing a musical instrument, cooking, facility with languages, and so forth.

23. 501 U.S. at 825 (quoting Booth v. Maryland, 482 U.S. 496, 517 (1987) (White, J., dissenting)).

a distinct measure of societal worth, and that this societal worth can be measured.

To promote the notion that all persons have equal worth to the commonweal is irrational, unrealistic, and typical of the well-intended but muddled thinking characteristic of so many in society today. Similarly misplaced is the notion that the manifest utility of any one human being to the society he inhabits cannot be measured. The loss of a corporate magnate in no way corresponds to the loss of an indolent drifter or an unregenerate felon. Some persons are plainly contributing, productive members of society. Others at least do no harm. However, many persons are unmistakable liabilities to society—less than worthless because they parasitically feed on precious societal resources and, in return, contribute nothing.[24] That the loss of contributors is a more momentous injury, more deserving of redress than the loss of parasites, cannot be gainsaid. My Proposal takes account of this harsh, yet forthright, fact.

Indeed, the entire tenor of the Court's *Payne* opinion implicitly stamps an imprimatur upon this blunt fact: Some murder victims are necessarily more valuable than others. Justice Rehnquist acknowledges the concern that "admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy."[25] He gives it short shrift and opines to the contrary, however, focusing upon the probity of victim impact evidence to demonstrate the "uniqueness" of the victim.[26]

The point is that evidence that the murder victim *was* a productive, contributing asset to his community, who will be grievously missed by those he leaves behind, cannot escape the fact finder. Indeed, the victim's "uniqueness" serves no other evidentiary function. And the fact finder must conclude, if it operates from a premise of logic and common sense, that it is a greater iniquity to slaughter a community paragon than to slaughter a reprobate. My Proposal does

24. Examples might include pimps, drug kingpins, mimes, poets, lawyers, essayists, and so forth.

25. 501 U.S. at 823.

26. Rehnquist argues that

> [a]s a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be.

Id. (quoting *Booth*, 482 U.S. at 506 n.8.)

nothing more than to candidly and straightforwardly acknowledge what is, beyond doubt, implicit in the Court's opinion.[27]

As a preliminary suggestion, the calculation of harm inflicted on the commonweal might take several factors into account. One, an instrumental factor, is the market value of the deceased's labor, skills, or other attributes. In this regard, "[t]he Value . . . of a man," to echo the words of Hobbes, "is . . . his Price."[28] Other less instrumental, more amorphous factors include the intelligence, accomplishments, skills, talents, moral rectitude, gregariousness, and sociability of the deceased, and the extent to which he tendered these attributes for the betterment of the common good.[29]

Concerning the degree of cruelty inflicted upon the deceased by the brutish murderer, it hardly needs to be articulated that the level of torment and degradation perpetrated upon the deceased is also vicariously perpetrated upon societal order and tranquility.[30] Thus, in calculating impairment points, this type of injury to the commonweal is a decidedly important factor.

B. The Allocation of Participation Rights

Once the total impairment score—a figure between zero and fifteen—is determined, the survivors should be afforded a right to participate in the process of meting out justice to the murderer. This right to participate will include an array of options, but the specific form of right extended to survivors will be linked to the number of impairment points amassed.

(1) *Enhancement* (5-6 points). At least, survivors who accrue a minimum number of impairment points[31] should be allowed to enhance the punishment meted out by judge or jury, whether the punish-

27. One wonders whether instructions should be given to the fact finder to direct its point calculation of the deceased's utility to the commonweal and, if so, what type. Should my Proposal find a favorable legislative reception, it will behoove legislators to consider this question.

28. THOMAS HOBBES, LEVIATHAN 151 (C. Macpherson ed., 1985).

29. Of course, expert opinion, although not essential, might provide valuable guidance to the fact finder as it computes impairment points for the degree to which society will suffer a detriment from the deceased's demise.

30. Janelle Greenberg, *The Victim in Historical Perspective: Some Aspects of the English Experience*, 40 J. SOC. ISSUES 77 (1984).

31. My Proposal requires a minimum number of points for participation. Given the generous means for accumulating points recommended herein, it must be presumed that if fewer than five impairment points are amassed, the deceased's slaying—and, concomitantly, the participation rights of survivors—are unworthy of vindication outside the ordinary criminal legal process.

ment be capital or not. I recommend heartily, even at the risk of offending the sensibilities of the reader, that consideration of highly effective corrective methods of earlier eras, such as flogging, branding, or mutilation, be permitted as enhancements.[32]

At the very least, some spectacle, such as that provided by importation of pillories,[33] stocks,[34] ducking stools,[35] cucking stools,[36] jougs,[37] bilboes,[38] or branks,[39] might be employed for purposes both exemplary and cathartic.[40]

(2) *Choice of Execution Method* (7-8 points). Survivors in this category might be afforded a choice among available methods of capital punishment once the criminal has been sentenced to death. The survivors could select from among the array of capital punishments employed throughout the history of civilization.[41] However, those who seek to forestall the extreme torture and gore that accompany some historically condoned capital punishment techniques, such as

32. Should more adventuresome legislatures wish to consider these forms of discipline, thorough descriptions are offered in a number of sources: WILLIAM ANDREWS, OLD-TIME PUNISHMENTS (Tobard Press 1970) (1890); HARRY ELMER BARNES, THE STORY OF PUNISHMENT: A RECORD OF MAN'S INHUMANITY TO MAN (2d ed. 1972); HANS BOECKER, LAW AND THE ADMINISTRATION OF JUSTICE IN THE OLD TESTAMENT AND ANCIENT EAST (Jeremy Moiser trans., Augsburg Publishing 1980) (1976); BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660 (1983); ALICE EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS (Singing Tree Press 1968) (1896); TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS (Penguin Books 1971) (1969); GEORGE IVES, A HISTORY OF PENAL METHODS; CRIMINALS, WITCHES, LUNATICS (Patterson Smith 1970) (1914); DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS (1978); PIETER SPIERENBURG, THE SPECTACLE OF SUFFERING: EXECUTIONS AND THE EVOLUTION OF REPRESSION (1984).

33. *See* ANDREWS, *supra* note 32, at 69-71; EARLE, *supra* note 32, at 44-55.

34. *See* EARLE, *supra* note 32, at 29-37.

35. *See* ANDREWS, *supra* note 32, at 22; EARLE, *supra* note 32, at 11-16.

36. *See* EARLE, *supra* note 32, at 29-37. The cucking stool was a strong chair in which the offender was seated so as to be pelted or derided by the crowd and must be distinguished from the ducking stool, which immersed the offender in liquid.

37. Jougs were iron neck-rings or collars with a joint or hinge at the back to permit their opening and closing around the neck of the culprit. The jougs were then fastened to a stationary object, such as a church door, a churchyard tree, a church post, or the marketplace cross. Jougs were used most often in Scotland and Holland as a means of enforcing ecclesiastical discipline. ANDREWS, *supra* note 32, at 108-10.

38. Bilboes were shackles used to display, and thus degrade, the offender publicly. EARLE, *supra* note 32, at 2-10.

39. The brank was an iron, framework-type mask that was applied over the head of the offender. *See* ANDREWS, *supra* note 32, at 38-39; EARLE, *supra* note 32, at 96-101.

40. For further elucidation of these purposes, see *infra* notes 54-63 and accompanying text.

41. Some ancient capital punishment techniques are mentioned in Lonny J. Hoffman, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 TEX. L. REV. 1039, 1059 (1992); Spierenburg, *supra* note 32, at 68-76.

burning at the stake, crucifixion, breaking at the wheel, boiling in oil, or drawing and quartering, might insist that the parameters of this participation right be restricted to those techniques currently in use.[42]

Of course, inherent in this participation right would be the choice of execution date. Allowing the survivors to choose the date offers two advantages. First, the murderer's endless appeals and petitions would come to an end at the date chosen by the survivors. Thus, the execution of the capital sentence, once imposed, would be swift and certain. Second, the survivors could coordinate the date selected with a momentous event—such as the celebration of an anniversary, a loved one's birthday, or perhaps even a holiday, such as the Fourth of July—thus making the occasion more memorable for all concerned.

This participation right could include an option to have the execution performed publicly. Implementing this choice would, of necessity, involve legislative reinstatement of public executions, an evolution that would provide distinct benefits to the survivors and the victims. Such benefits include a staunch demonstration of commitment to the cause of swift and certain punishment and an even more potent catharsis for the survivors and for society generally.[43]

(3) *Performance of the Execution* (9-10 points). Survivors who accumulate a higher number of impairment points should be afforded the emotional and psychological vindication that accompanies personally dispatching the murderer.

For most commonly-employed capital techniques, such as hanging, electrocution, and lethal gas, only a switch or lever need be pulled at the critical juncture, so no particular skill, training, assistance, or preliminary planning would be required. However, use of the firing squad would necessitate at least a modicum of marksmanship. Administration of a lethal injection presumably would require medical assistance. Thus, the government would be obliged to take a few modest preliminary steps to aid the survivors' participation. For the firing squad, those survivors lacking in marksmanship could be equipped with a high-powered weapon and permitted to stand within close proximity to the criminal. For lethal injection, a medical assistant could insert the catheter and mix the lethal potion, leaving to the

42. These include: lethal injection, electrocution, lethal gas, hanging, and firing squad. See CAPITAL PUNISHMENT, *supra* note 3, at 7, for a delineation of execution methods by state.

43. *See also infra* notes 54-63 and accompanying text (describing the benefits of reviving the practice of public executions).

survivors only the actual introduction of the fatal solution into the criminal's veins.[44]

Of course, as suggested in conjunction with the participation right of choosing the execution method, survivors privileged to actually implement the capital penalty should have the option of selecting the date.[45]

(4) *Forced Labor by Defendant* (Over 10 points). Those survivors most grievously affronted by the criminal's murder should reap the most substantial largess. And the commonweal, most grievously wounded in cases where the total of impairment points is high, similarly deserves to reap a boon. Thus, I propose that the criminal be made to pay—literally—for the victim's slaughter by being forced to labor at the behest of the survivors. Upon imposition of the capital sentence, the government would simply deliver the defendant to the slain victim's family or loved ones for retribution and remuneration. This alternative of forced labor by the convicted miscreant is akin to indentured servitude. The criminal would labor for money either for the survivors, like an indentured servant, or in other employment, the proceeds of which would be used solely to compensate survivors.[46]

44. These minor inconveniences to government can be readily worked out. For example, the government could put both a representative of the National Rifle Association and Dr. Jack Kevorkian on permanent retainer so that each, when required, could give instruction in their respective specialties. Thus, these minutiae should not preclude the survivors from personally inflicting the capital penalty.

45. *See supra* text following note 42.

46. In all candor, I must confess that this recommendation did not originate with me. The "blood feud," wherein the criminal is delivered to the family of his victim for retribution, has historical roots as ancient as mankind.

The early Greeks sanctioned Orestes' deadly retribution against Aigisthos as reparation for the latter's brutal killing of Orestes' father, Agamemnon. *See* MACDOWELL, *supra* note 32, at 10-21. Although not directly applicable to a discussion of capital crimes, the ancient Romans devised an ingenious method by which to discipline debtors. An insolvent debtor was handed over to his creditor, who could kill him or sell him into slavery abroad; if there were several creditors, they could cut up the debtor's body into pieces corresponding to the amount of their respective claims. H.F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 47 (2d ed. 1961).

Many primitive communities, not satisfied to wreak vengeance upon the malefactor himself, obliterated the entire family or community of the criminal. *See* L.T. Hobhouse, *Law and Justice*, *in* CONSIDERING THE VICTIM: READING IN RESTITUTION AND VICTIM COMPENSATION 8-13 (Joe Hudson & E. Burt Galaway eds., 1975). The *Lex Talionis*, or "an eye for an eye," with its pendant prescription, "son for son, daughter for daughter, slave for slave, ox for ox," might properly be viewed as a circumscribed application of the "blood feud." *Id.* at 12.

The "blood feud" was the primary enforcement mechanism in England and continental Europe following the fall of Rome. The victim, or the victim's kin, exacted vengeance against and remuneration from the perpetrator or his kin. Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 938-39 (1985).

This form of participation right entails no undue intrusion into the malefactor's liberties. After all, it is settled that the murderer's rights can be drastically curtailed by imprisonment, even for decades, or by deprivation of life itself through execution. Thus, it is similarly settled that to diminish the miscreant's freedom by indenture would not impose a substantially greater constraint upon liberty.

Presumably, the criminal would earn sufficient funds through his labor to pay for his own upkeep and to provide a tidy income for the survivors. This would accomplish not only retribution and purgation for the survivors, but also conservation of resources for society.[47]

One matter arises in conjunction with this participation right that should be mentioned. Should consideration be given to the possibility that the villain might escape? Should steps be incorporated in the formulation of this participation right to forestall this possibility? One suggestion is to permit the survivors to engage in minor mutilation of the criminal, such as cutting off a hand or foot, or gouging out an eye, in order to make it exceedingly difficult for him to escape. This detail need not be resolved now, but may be relegated to the legislature, a deliberative body more expert in matters of this kind.

The "blood feud" remained a matter of honor for Germanic tribes from the time of King Ethelbert in the sixth and seventh centuries; especially in homicide cases, family members were constrained to vindicate the victim's integrity. Harold J. Berman, *The Background of the Western Legal Tradition in the Folklaw of the Peoples of Europe*, 45 U. CHI. L. REV. 553, 556-66 (1978).

The only originality I bring to this ancient custom is the suggestion that the survivors not massacre the malefactor but, instead, use him to their own—and by extension to society's—benefit.

47. It might be argued that a less draconian measure for accomplishing similar goals be adopted—simple payment of money. Historical precedent is found in numerous sources, such as the Code of Hammurabi and Germanic tribes' traditions.

Under the Code of Hammurabi, the specified sum of money to be paid as punishment for a murder varies depending upon the status and societal worth of the victim. *See* Hobhouse, *supra* note 46, at 8-9.

In Germanic tribes, the *wergild*, paid by the murderer or the murderer's family to the family of the deceased, represented the monetary value set on a person's life. The amount payable was dependent upon a number of factors, including the slain person's rank in society. Germanic tribes took into account the rank, sex, age, and status as a slave or a free man in the calculation, on the premise that low-ranked persons, women, very old or very young persons, and slaves were simply worth less. *Id.* Greenberg, *supra* note 30, at 80.

These factors need play no role in *wergild* payment in modern times, because the fact finder would have already taken them into account in assigning impairment points for the status of the victim and the detriment suffered by society at his loss.

However, I reject this alternative of simple payment of money on several grounds: payment without servitude would allow a wealthy criminal to simply "buy his way out," with no additional retribution; society would retain the obligation to house and feed the criminal; and the survivors would be deprived of their deserved catharsis.

C. Consideration of Remaining Inquiries

Several inquiries are certain to arise from an initial perusal of my Proposal. First, should survivors who choose not to utilize their participation rights be permitted to sell or barter them? If so, should the government impose restrictions upon price or transferees?[48] This delicate inquiry requires cautious deliberation, but I recommend that these participation rights be treated like any other commodity, with price and product desirability determined by market factors.

Second, should survivors who express aversion to the category of participation rights earned by their impairment point assessment be allowed to choose another category? Again, this poses a delicate inquiry—one can certainly discern the potential benefit in gratifying the survivors' desires and in the financial boon to the government in permitting survivors to pay a supplemental fee in order to work their way into a higher category.[49] But, in order to preserve some semblance of regularity and efficiency in the administration of this scheme, I recommend that survivors dissatisfied with their allotted participation rights be permitted to opt only for a lower category, not for a higher one. Those who remain truly aggrieved retain the opportunity to bargain their rights for profit rather than to take advantage of these rights themselves.

Third, the impairment points must be awarded on a collective basis. In other words, the injury experienced by family members and friends is calculated as injury to the group as a whole. The fact finder might find it convenient to calculate some sort of average in a situation in which the nature and extent of trauma experienced by family members and loved ones vary markedly. To conduct this assessment on any basis other than a collective one would unjustifiably reward those who survived exceedingly prolific or gregarious deceaseds. However, this recommendation for collective treatment of family members and loved ones does raise, at least in some families, the specter of a troublesome dilemma: How should conflicts among family members and loved ones as to the use of the awarded participation right be resolved?

On one hand, to categorize the participation rights as a commodity implies that these rights entail all the privileges ordinarily associ-

48. For example, should transfer be restricted to those who were acquainted with the deceased and, therefore, have some discernible personal interest in these participation rights?

49. Indeed, the impairment points toted up by survivors could be analogized to frequent flyer miles, to be "spent" at will, as the survivors deem appropriate.

ated with personal property—privileges that can be vindicated by the legal system if breached. On the other hand, any savings in systemic costs gleaned from adoption of my Proposal could be briskly dissipated if civil courts became clogged with combatting survivors. Thus, I recommend, although somewhat tentatively, that conflicts be resolved privately, by a simple majority vote, with no recourse to the legal system allowed to survivors aggrieved by the outcome.

Fourth, a most delicate problem—what if the slain person has no relatives or loved ones? Of course, the government could act "in loco familiae," but after judicious deliberation, I have opted against this course. Although, in this situation, a "zero" would be assigned to the determination-of-harm-to-the-survivors factor, points could still be amassed for the victim's worth or status in his community and for the impact upon society of the victim's demise. The government could then hold a lottery to raffle off the participation rights to the person fortunate enough to hold the winning ticket. Or, if this bounty evolved into a valued prize, a regularly-scheduled auction could be held and the participation rights sold to the highest bidder for the benefit of the public coffers.

III. Practicality of the Proposal

At the risk of appearing immodest, I echo my mentor, Dr. Swift, in stating that "the advantages by the proposal which I have made are obvious and many, as well as of the highest importance."[50] In fact, all who are touched by the victim's death—except, of course, the victim himself—stand to reap substantial benefits.

A. Advantages to Society

(1) Cost-Effectiveness

For all categories of participation rights except enhancement, my Proposal would save substantial governmental costs.[51] The governmental obligations to house, clothe, feed, and create make-work for murderers would exist for only a relatively brief time. Where the survivors choose the execution technique or perform the execution, the obligations would exist only from apprehension to execution. Assuming that the survivors select an early execution date, this period should

50. Jonathan Swift, *A Modest Proposal for preventing the Children of poor People in Ireland from being a Burden to their Parents or the Country, and for Making Them Beneficial to the Public, in* JONATHAN SWIFT 492 (A. Ross & D. Woolley eds., 1984).

51. *See* CORRECTIONAL POPULATIONS, *supra* note 3, at 63 (citing the high cost of maintaining criminals in prison).

not be lengthy. Where the survivors take charge of the murderer, the obligation would continue only from apprehension to the conclusion of trial.

Yet another cost-saving advantage is possible. Execution of more murderers might diminish the number of prisons required. Prison populations could be consolidated, and the empty facilities could, with a relatively small governmental investment, be converted to hotels and resorts for public use.[52]

(2) Deterrence

My Proposal would deter crime. Punishment would be swift and certain, albeit arbitrary in terms of method. Thus, the murderer would be assured that, if convicted, punishment would be swift and thorough, although he would have to speculate as to its means. This unique combination of certitude and arbitrariness should deter all but the most hardened or reflexive criminals. In addition, of course, imposition of capital punishment specifically deters the person executed.[53]

(3) Communal Catharsis and Public Executions

To some extent, my Proposal in its present form would promote catharsis—that emotional/psychological purging that accompanies attainment of communal retributive objectives—by enhancing the assurance that, at least in capital cases, retributive justice would indeed be meted out swiftly. However, for those more enterprising persons who seek even more effective means for promoting communal catharsis, I offer another suggestion: reinstatement of public executions.[54]

52. Of course, the attractiveness of these prison facilities as vacation spots would require shrewd choices. Prisons located in less attractive geographic surroundings could be reserved for prisoners, while those facilities located in scenic places could be converted to revenue-producing resorts.

53. A 1973 poll reported by the United States Department of Justice showed that 61% of those questioned agreed that capital punishment is more effective than other penalties in specifically deterring miscreants from committing crimes. Francis A. Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L. REV. 311, 320 n.35 (1985). *See also* Robert Bartels, *Aside, Capital Punishment: The Unexamined Issue of Special Deterrence*, 68 IOWA L. REV. 601 (1983) (presenting an empirical study of the special deterrent effect of the death penalty).

54. Of course, the considerable benefits of publicly executing the murderous villain would not obtain where the criminal is to spend the rest of his natural days as an indentured servant to the survivors. Although others might adjudge the situation differently, it is my view that the need to assuage the family and loved ones of the deceased outweighs even the substantial benefits that inhere in public executions. I do strongly urge, however, that even where the survivors are entitled to indentured servitude, some period of public

In earlier times, authorities understood how essential the cleansing that accompanies catharsis was to the well-being of the community. In some societies, including those ruled by Mosaic law, the community was afforded an actual participation right in "collectively repelling and destroying the criminal."[55] English and colonial punishments were all public spectacles.[56]

In modern times, however, "[t]he sight of whippings, thumb-cuttings, and hangings is not part of the experience of the average inhabitant of the Western world. Most people have merely a vague sense of public physical punishment as a thing of the past."[57] Public executions have not been a part of the communal consciousness in America for more than half a century.[58] Reviving public executions would permit communal purging of outrage, horror, repulsion, and vengeance. The attendant spectacle would also graphically exhibit the power of the law and the triumph that accompanies its vindication:

> [P]ublic torture and execution must be spectacular, it must be seen by all almost as its triumph. The very excess of the violence employed is one of the elements of its glory: the fact that the guilty man should moan and cry out under the blows is not a shameful side-effect, it is the very ceremonial of justice being exposed in all its force. Hence no doubt those tortures that take place even after death: Corpses burnt, ashes thrown to the winds, bodies dragged on hurdles and exhibited at the roadside. Justice pursues the body beyond all possible pain.[59]

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exhibition of the criminal in stocks, pillories, jougs, a ducking stool, or some other instrument should precede their taking title to him. *See supra* notes 33-39. This public exhibition could vindicate the morality play and scapegoat rituals. *See infra* notes 60-62 and accompanying text. It could also provide revenue for the government if spectators were charged a pittance per view and perhaps an enhanced fee for the opportunity to duck or pelt the criminal.

55. BOECKER, *supra*, note 32, at 39-40. In other societies, the criminal was made to run a gauntlet. *Id.* at 64.

56. CHAPIN, *supra* note 32, at 50-55. *See also* sources cited *supra* notes 33-39.

57. SPIERENBURG, *supra* note 32, at vii.

58. For an account of one of the last public executions performed in this country, a hanging in Kentucky in 1936, see Dane A. Drobny, *Death TV: Media Access to Executions Under the First Amendment*, 70 WASH. U. L.Q. 1179, 1187-88 (1992). The description of the public reaction illustrates the cathartic value of public executions: "[T]he crowd, 'some jeering and some festive,' awaited his execution. The night before the execution some of the spectators had participated in 'hanging house-parties' while others, earlier that day, had enjoyed 'hanging breakfast[s].' . . . As the authorities lowered [the criminal's] body from the scaffolds, 'souvenir hunters rushed forward . . . and tore the black hood of death off his head.'" *Id.*

59. MICHEL FOUCAULT, DISCIPLINE AND PUNISHMENT: THE BIRTH OF THE PRISON 34 (Alan Sheridan trans., Pantheon Books 1977).

Reestablishing public executions would provide the following additional benefits to the commonweal:

(a) Public Executions as Post-Modern Morality Plays. This public spectacle of execution manifests the triumph of Justice over Evil, reminiscent of ritual morality plays. Open infliction of capital punishment, meticulously scripted and flawlessly executed, would soon become in post-Modernist times as entertaining and instructional as morality plays were in medieval times.[60]

(b) Condemned Criminal as Ritual Societal Scapegoat. In fact, the publicly-executed villain himself could serve an important role in the revival of yet another lost societal ritual: that of communal scapegoat. In antiquity, the scapegoat was a symbolic repository for any evils or adversities that beset society, such as sin, plague, drought, famine, and so forth. Once chosen, the scapegoat was beaten, tortured, pursued into exile, or even slain in expiation of communal evils.[61]

Today, as a prelude to the actual execution, the community, in the guise of appropriate representatives,[62] would ritually load all societal evils, terrors, and catastrophes onto the criminal—drugs, crime, the flaccid economy, foreign terrorists, AIDS, cancer, hurricanes, tornadoes, hunger, child abuse, and so forth—and symbolically purge soci-

60. The motif of the medieval morality plays began with "an archetypal human perception: to fall out of innocence into experience." In "both a theatrical and a theological sense," it is the "human predicament" that "creates the morality play's plot and distinctive structure." ROBERT POTTER, THE ENGLISH MORALITY PLAY: ORIGINS, HISTORY AND INFLUENCE OF A DRAMATIC TRADITION 9 (1975). Whether "innocence" was ever an apt term to describe the condemned villain, it is certain that he has fallen and that his demise would provide valuable lessons for the crowds in a public, ritualized ceremony.

> Morality plays are *sermons corporei*, embodied sermons aimed without equivocation or evasion at the moral betterment of their audiences. Their roots lie in the sermons of medieval preachers, and while they turned during the sixteenth century toward secular issues, they do so with a strong religious bias. Thus success for a morality play is always some form of salvation, religious for the early plays, sectarian, political, or broadly social for the later plays.

EDGAR SCHELL & J.D. SHUCHTER, ENGLISH MORALITY PLAYS AND MORAL INTERLUDES vii (1969). *See generally* CHRISTINE RICHARDSON & JACKIE JOHNSTON, MEDIEVAL DRAMA (1991); SPIERENBURG, *supra* note 32, at 43-48 (discussing the dramatization of executions).

61. For example, "[t]he Athenians regularly maintained a number of degraded or useless beings at the public expense; and when any calamity, such as plague, drought, or famine, befell the city, they sacrificed two of these outcasts as scapegoats. One was sacrificed for the men and the other for the women." JOHN VICKERY & JONATHAN SELLERY, THE SCAPEGOAT: RITUAL AND LITERATURE 27 (1972). Clearly, a condemned miscreant is particularly well-suited to play this role.

62. These representatives could be persons of local eminence, such as a governor, mayor, or alderman, or could be the survivors themselves.

ety of these problems. If the criminal is to be executed anyway, why not incorporate "scapegoat" rituals as part of the ceremony and, as it were, symbolically purge society of both its specific problem (the murderer) and its general problems (*e.g.*, societal evils and disasters) simultaneously, in specific application of the "two birds with one stone" theory?

(c) Cost Recoupment. A subsidiary advantage of public executions is that government could also reap substantial economic benefit from selling the rights to televise or film the execution for the benefit of those without time or resources to travel to the site. This would allow spectators and members of the press corps to watch without charge and would boost attendance. At least, the sale could recoup the cost of dispatching the criminal.[63]

B. Advantages to the Survivors

The advantages that accrue from my Proposal to the family and loved ones of the slain victim are almost too obvious to restate. In fact, viewed from a societal perspective, the value of this Proposal exceeds even the economic benefits bestowed upon the government. Mild punishment only exacerbates the sense of rage of the survivors. Providing the survivors with a vigorous role in the dispatch of the criminal would "help to assuage the bitterness of their lot."[64] Of course, for those survivors whose impairment points total more than ten, the substantial economic boon of a lifelong indentured servant is no small reward.

C. Advantages to the Criminal

And what benefit does the murderer reap from my Proposal? I maintain that the condemned criminal gleans a not insubstantial ad-

63. Credit for the ingeniousness of this aspect of my Proposal is properly attributed to KQED and to Phil Donahue. The former fought for the right to broadcast the execution of Robert Alton Harris by the State of California. The latter sought to televise the execution of David Ramson by the State of North Carolina. Both attempts were confounded by squeamish courts. KQED, Inc. v. Vasquez, No. C-90-1383 RHS, 1991 U.S. Dist. LEXIS 21163 (N.D. Cal. June 7, 1991); Lawson v. Dixon, No. 94-6640, 1994 U.S. App. LEXIS 14594 (4th Cir. June 13, 1994), *aff'd*, 114 S. Ct. 2700 (1994). Surely some intrepid court will accede to these eminently reasonable demands in a future case.

This likelihood raises another issue. It is a subtle question of property law, a subject in which I profess no expertise, as to whether the criminal shares any ownership rights in the occasion of his execution. However, should the determination be that he is entitled to a share of the revenues, the government's charge could be adjusted accordingly.

64. Margery Fry, *Justice for Victims*, *in* CONSIDERING THE VICTIM: READINGS IN RESTITUTION AND VICTIM COMPENSATION 56 (Joe Hudson & E. Burt Galaway eds., 1975).

vantage, insofar as he is afforded the opportunity to contribute something valuable to society: either his labor as an indentured servant or his symbolic role as morality player and scapegoat. Either alternative provides him with a more useful existence than year after endless year of desultory, death-within-life prison existence.[65]

IV. Conceivable Criticisms

I openly acknowledge that some purportedly refined or delicate sensibilities might pose objections to perceived deficiencies in my Proposal.[66] Particularly, I foresee a reproach that the Eighth Amendment's "cruel and unusual punishment" strictures obstruct serious consideration of my Proposal by state and federal law-making bodies.[67] However, I refer these critics to the Eighth Amendment decisions of the United States Supreme Court, the ultimate arbiter of the constraints imposed by the Constitution, for articulation of the current parameters of the Eighth Amendment.

Particular government practices are not cruel and unusual unless the "evolving standards of decency that mark the progress of a maturing society"[68] declare those practices to be abhorrent. Of course, the

65. Moreover, the criminal might be encouraged to repent. Particularly if he is to be publicly dispatched, he could be encouraged to publicly repent in order to save his soul. He could be garbed in sackcloth, with head shorn, as he intones his dramatic, public confession and begs forgiveness from the community. This spectacle would certainly titillate the spectators and enhance their purgative experience.

66. A subsidiary objection might be that a civilized society should not emphasize retribution as the core of its criminal legal process but, instead, should design a punishment process that focuses on rehabilitation of the criminal. In response, I maintain, with George Will, that vengeance is the ultimate morality: "The element of retribution—vengeance, if you will—does not make punishment cruel and unusual, it makes punishment intelligible. It distinguishes punishment from therapy. Rehabilitation may be an ancillary result of punishment, but we punish to serve justice, by giving people what they deserve." George F. Will, *The Value of Punishment*, NEWSWEEK, May 24, 1982, at 92.

Moreover, in demonstrating the essentiality of the element of blame in constructing a system of punishment, Professor White explained, quoting Justice Holmes, that "even a dog knows the difference between being stumbled over and being kicked." James B. White, *Making Sense of the Criminal Law*, 50 U. COLO. L. REV. 1, 21 (1978).

67. I concede that some corrective measures might be too harrowing for some to contemplate—for example, burning at the stake, crucifixion, breaking at the wheel, drawing and quartering, or boiling in liquid. In each of these instances, death is gruesome, protracted, and tortuous. That American society long ago rejected these ghastly devices is a moving tribute to the measure of our genuine collective humanity. These varieties of inflicting capital punishment can be eliminated from consideration without affecting the essence of my Proposal.

68. Trop v. Dulles, 356 U.S. 86, 101 (1958). The Court has stressed that the most telling reflection of prevailing community mores lies in the laws enacted by representative legislatures: "The clearest and most reliable objective evidence of contemporary values is

mere fact of executing people is not offensive to American standards of decency; despite the decisions of great numbers of less fortitudinous nations to abolish capital punishment, the United States of America—accompanied by Iran, Iraq, Saudi Arabia, China, and certain African countries—remains steadfast in its adherence to the principle that extinguishment of human life is appropriate to the pursuit of Justice.[69]

In terms of specific execution techniques, the Court has ruled, for example, that dispatching a criminal by electrocution, a process that entails frying someone until his brain boils and his eyes bulge is not "cruel and unusual."[70] The Supreme Court was apparently so unimpressed with evidence that use of the gas chamber is cruel and unusual—evidence that a trial judge found sufficiently meritorious to warrant further consideration—that the Court issued an order to federal courts to cease delays and get on with the business of dispatching

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the legislation enacted by the country's legislatures." Penry v. Lynaugh, 492 U.S. 301, 331 (1989).

69. *See* Viktor Mayer-Schönberger, *Crossing the River of No Return: International Restrictions on the Death Penalty and the Execution of Charles Coleman*, 43 OKLA. L. REV. 677, 679 (1990). Western European nations have completely abolished the death penalty, as have most of the former East bloc nations. Albania and Russia have curtailed its use. The South American democracies—Argentina, Brazil, Columbia, Ecuador, Paraguay, Peru, Uruguay, and Venezuela—have banned capital punishment. Chile is considering abolition. South Africa, which averaged well over 100 executions a year a decade ago, suspended capital punishment in 1990, and a law reform process leading towards abolition has begun. Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990s*, 20 FLA. ST. U. L. REV. 7, 8-10 (1992).

70. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); *In re* Kemmler, 136 U.S. 436 (1890). *See* Jacob Weisberg, *This Is Your Death; Capital Punishment: What Really Happens*, THE NEW REPUBLIC, July 1, 1991, at 23. In the grisly description by Justice Brennan:

> [T]he prisoner's eyeballs sometimes pop out and rest on [his] cheeks. The prisoner often defecates, urinates, and vomits blood and drool. The body turns bright red as its temperature rises, and the prisoner's flesh swells and his skin stretches to the point of breaking. Sometimes the prisoner catches on fire, particularly if [he] perspires excessively. Witnesses hear a loud and sustained sound like bacon frying, and the sickly sweet smell of burning flesh permeates the chamber.

Medical reports and witness accounts of executions reveal that "[a]n electrocuted corpse is hot enough to blister if touched. The autopsy must be delayed while internal organs cool.... The brain appears cooked in most cases." *Id.* According to one physiologist, death by electrocution "must feel very similar to the medieval trial by ordeal of being dropped in boiling oil." *Id. See also* Hoffman, *supra* note 41, at 1055-61 (challenging the contention that electrocution is instantaneous and painless).

That electrocution almost never results in instantaneous death and involves pain and torture to the prisoner is obviously only a technicality that is not worthy of the Court's attention.

the criminal.[71] Other techniques for administering capital punishment might similarly upset those among us who are prone to squeamishness.[72] Apparently, the Court's considered legal conviction is that a painful, torturous, or lingering death does not render the execution cruel and unusual. In fact, given the heinousness of the murderer's dastardly slaying, extended agony and suffering are an integral component of the execution.

In terms of appropriate candidates for execution, the Supreme Court has ratified the execution of children who were 16 or 17[73] when they murdered, of persons of deficient mental ability,[74] and of persons who had no plan to kill and did not actually pull the trigger.[75] Even

71. Vasquez v. Harris, 112 S. Ct. 1713 (1992). Concerning the physical effects of cyanide gas:

> At first there is evidence of extreme horror, pain and strangling. The eyes pop. The skin turns purple and the victim begins to drool. It is a horrible sight. . . .
>
> In medical terms, victims of cyanide gas die from hypoxia, which means the cut-off of oxygen to the brain. The initial result of this is spasm, as in an epileptic seizure. Because of the straps, however, involuntary body movements are restrained. . . . "The person is unquestionably experiencing pain and extreme anxiety. . . The pain begins immediately and is felt in the arms, shoulders, back and chest. The sensation is similar to the pain felt by a person during a heart attack, where essentially the heart is being deprived of oxygen. . . We would not use asphyxiation, by cyanide gas or by any other substance, in our laboratory to kill animals that have been used in experiments."

Weisberg, *supra* note 70, at 26.

72. Concerning hanging, "the dangling person feels cervical pain, and probably suffers from an acute headache as well, a result of the rope closing off the veins of the neck." Weisberg, *supra* note 70, at 24.

> [T]he belief that fracture of the spinal cord causes instantaneous death is wrong in all but a small fraction of cases. The actual cause of death is strangulation or suffocation. In medical terms, the weight of the prisoner's body causes tearing of the cervical muscles, skin, and blood vessels. The upper cervical vertebrae are dislocated, and the spinal cord is separated from the brain, which causes death.

Lethal injections, which have been compared to the way a devoted owner treats "a faithful dog he's loved and cherished," might cause extreme pain if injected into a muscle instead of a vein, or if the needle becomes clogged. *Id.*

73. Stanford v. Kentucky, 492 U.S. 361 (1989).

74. *See* Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that the Eighth Amendment does not erect a per se bar to execution of a mentally retarded criminal with the mental age of a six-and-a-half year old child); Lowenfield v. Butler, 495 U.S. 995 (1988) (opinion of Brennan, J., and Marshall, J., dissenting from denial of an application for a stay of the execution of a criminal who alleged he had become insane since trial, an allegation supported by psychiatric evidence). Capital punishment has been endorsed "even for retarded killers like Johnny Ray Anderson—a drug abuser since age five, with an IQ of seventy—or Dalton Prejean, abused by a relative, abandoned by his parents, brain-damaged and retarded." David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1649 (1992). *See also* E.J. Dionne, Jr., *Capital Punishment Gaining Favor as Public Seeks Retribution*, WASH. POST, May 17, 1990, at A12.

75. Tison v. Arizona, 481 U.S. 137, 137-38 (1987).

persons who claim the ability to demonstrate a factual basis for their innocence can be executed without a hearing on the exculpatory proof amassed.[76]

There has yet to be widespread popular outcry concerning these practices.[77] What more obvious manifestation could there be that, in the United States of America, dousing the life of a criminal miscreant holds utterly no affront to the "evolving standards of decency that mark the progress of a maturing society"?[78]

Within these parameters, can it be argued seriously that anything in my Proposal—which suggests only minor corrective efforts to render the mechanisms by which just deserts are meted out to murderous villains more constructive and cost-efficient—transgresses the prohibition against "cruel and unusual" punishment?

V. Conclusion

My Proposal serves to accomplish salient societal goals. It conserves societal wealth and may even reap an economic profit for government. It entails only a modicum of legislative reforms. I make no claim that it will not bear improvement in incidental ways. I will consider, with alacrity, any suggestions for modifications or contradictions of the recommendations I modestly set forth herein, so long as any suggested revisions achieve the essential objectives of my Proposal. Alterations must: (1) assuage the injustice long perpetrated upon victims and their families and loved ones by an insensitive criminal legal process; (2) provide a retributive context in which society generally can pour out its vengeance and revulsion against criminal miscreants; and (3) furnish food, living accoutrements, and a useful function for otherwise useless, murderous, wretched souls.[79] In other words, I insist that any submitted corrections to my modest Proposal continue to progress along the path first trod upon by the Court in *Payne*.

76. Herrera v. Collins, 113 S. Ct. 853 (1993).

77. Of course, a few fringe organizations, such as Amnesty International, perpetually champion universal abolition of capital punishment. *See* AMNESTY INTERNATIONAL, THE DEATH PENALTY: LIST OF ABOLITIONIST AND RETENTIONIST COUNTRIES, ACT 50/01/92 (1992).

78. Trop v. Dulles, 356 U.S. 86, 101 (1958).

79. Swift, *supra* note 50.